No. 1019.

Supreme Court of the United States.

CHARLES B. LAMBORN, *Plaintiff in Error*,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DICKINSON, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

C. E. BRETHERTON,
Of Counsel.

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In the Supreme Court of the United States.

ERROR FROM THE CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

CHARLES B. LAMBORN, *Plaintiff in Error*,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DICKINSON, *Defendant in Error*.

STATEMENT OF CASE.

Action to recover money paid by plaintiff in error for purchase of seventy tax sale certificates on lands belonging to the United States and not taxable. Defense chiefly relied on, that purchase was made on behalf of National Land Company, which claimed to own the lands, and was thus equivalent to a voluntary payment of the taxes.

Trial by the Court and judgment for defendant in error on special findings of fact, with certificate of division of opinion as to whether on the special findings of fact the Court should have rendered judgment for the plaintiff or defendant.

The record being still unprinted, though on file several months, references to its printed pages are not given. The annexed abstract, however, contains all the record, except merely formal matters and the

second and following causes of action in the petition, which are merely repetitions of the allegations of the first applied to other tracts of land.

By stipulation the case is submitted on briefs without oral argument.

ASSIGNMENT OF ERROR.

The only error now assigned is that on the special findings the Court should have rendered judgment for plaintiff in error and not for defendant in error.

In the Supreme Court of the United States.

CHARLES B. LAMBORN, *Plaintiff in Error*,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DICKINSON, *Defendant in Error.*

Abstract of Record.

Error from judgment for defendant in the Circuit Court of the District of Kansas in an action brought by plaintiff in error against defendant in error.

Petition Filed February 23, 1874.

The plaintiff above named complains of the above named defendant and alleges that said plaintiff is a citizen of the State of Missouri, and that the County of Dickinson, in the State of Kansas, now is and was at the several dates of the transactions hereinafter mentioned and described, a body corporate and politic, duly created and existing under and by virtue of the laws of the State of Kansas, and as such authorized to sue and subject to be sued under and by the name and style of the Board of County Commissioners of the County of Dickinson.

And for a first cause of action said plaintiff alleges, that in the year 1870 the officers of Dickinson County levied a tax for that year on the following described real estate, situate in said county, to wit: S. E. ¼ of Section 8, Town. 11, Range 2.

That on the 2nd day of May, 1871, said tax remaining unpaid, the then County Treasurer of said county sold said real estate at public auction, at his office, in Abilene, to said

county, for the sum of $12.00, being the full amount of taxes and charges at that time due thereon for said year.

That on the 8th day of January, 1872, this plaintiff paid into the County Treasury of said county the sum of $17.66, that being the amount equal to the cost of redemption of said real estate at that time; that thereupon the County Treasurer of said county issued and gave to said plaintiff a certificate, dated on the day and year last aforesaid, describing the said real estate, the amount for which it was so bid off, the amount paid into the County Treasury by this plaintiff for the same, the time when the owner of said certificate would be entitled to a deed, and numbered the same 1, to correspond with the number of said tract of land in the book of tax sales of said county.

That on the same day and year last aforesaid, the County Clerk of said county duly assigned said certificate to this plaintiff, and entered such assignment on the duplicate book of tax sales in his office.

That afterwards, and on the same day and year last aforesaid, the plaintiff, then holding said tax certificate, paid into the County Treasury of said county the sum of $19.83, being the amount then due for taxes levied upon said real estate by the officers of said county for the year 1871, and produced said certificate to the County Treasurer, who thereupon endorsed thereon the amount so paid and the date of such payment.

That afterwards, and on the 1st day of January, 1873, this plaintiff, then holding said tax certificate, paid into the County Treasury of said county the sum of $33.73, being the amount then due for taxes, levied upon said land by the officers of said county for the year 1872, and produced said certificate to the County Treasurer, who thereupon endorsed thereon the amount so paid and the date of such payment; a copy of which said certificate, with the assignment of said County Clerk, except as to dates, amounts, description of property and names, is hereunto annexed, marked "Exhibit 'A,'" and made a part of this petition.

That at the time of the levy of the several taxes for the years 1870, 1871 and 1872 upon said real estate, the same was the property of the United States Government, and was exempt from taxation by the State of Kansas.

That this plaintiff, at the time of the said several payments so as aforesaid made by it into the County Treasury of said county, was not aware of such exemption, but supposed, as was claimed by the officers of said county, that said taxes were legal and valid; that, so soon as the plaintiff was aware of the fact of the illegality of said taxes, to wit: on or about the first day of January, 1874, he offered to return said tax certificate to the County Treasurer of said county, and at the same time demanded of such Treasurer that he refund to this plaintiff the several amounts so as aforesaid paid by him into the County Treasury, with interest at the rate of ten per cent. per annum on each of said sums from the time of said payments respectively, which was then and there refused by said Treasurer.

That said plaintiff is now the legal owner and holder of said certificate, but that neither said County Treasurer nor said county has paid to this plaintiff the several sums so paid by him, nor any part thereof, but said county is now indebted to him therefor in the sum of $71.21, with interest at the rate of ten per cent. per annum on $37.49 from July 8th, 1872, and on $33.72 from July 1st, 1873.

(Then follow seventy other counts differing from the above only in the description of land, amounts of the tax, and dates of payments.)

Wherefore, plaintiff demands judgment against said defendant for the sum of seven thousand four hundred and fifty-three and $\frac{17}{100}$ dollars, with interest at the rate of ten per cent. per annum on $4,873.73 from January 8th, 1872; on $2,539.99 from January 1, 1873; on $24.94 from April 4th, 1872, and on $14.69 from August 23rd, 1871, besides the costs for this action.

PRATT & FERREY,
Att'ys for Pl'ff.

EXHIBIT A.

Certificate No.

I, County Treasurer of Dickinson County, in the State of Kansas, do hereby certify that the following described real estate, to wit: was, on the day of A. D. 18 , sold by me at public auction, at my office in Abilene, to for the sum of

dollars, being the full amount of tax and charges due upon said real estate for the year 18 , and I further certify that has this day paid into the County Treasury of said county the sum of dollars, and that the said his heirs or assigns will, on the day of A. D. 18 , be entitled to a deed therefor from Dickinson County unless said real estate shall have been redeemed as provided by law.

Given under my hand at my office in Abilene, Dickinson County, State of Kansas, on this day of A. D. 18 .

—. —. ———,
County Treasurer.

I, County Clerk of said county, in consideration of the above certified payment of dollars, do hereby assign all the right, title and interest of said Dickinson County to the above certificate to and I hereby certify that this assignment has been duly entered on my Duplicate Book of Tax Sales in my office.

Given under my hand and official seal on this day of A. D. 18 .

—. —. ———,
County Clerk.

Answer Filed March 25, 1874.

And now comes the Board of County Commissioners of the County of Dickinson, the above named defendant, and for its answer to the petition of Charles B. Lamborn, the above named plaintiff, denies all, each and every allegation and averment therein contained.

Second. And for a second and further ground of defense in this behalf said defendant avers that heretofore, to wit: before the first day of January, A. D. 1868, the United States of America, by its officers and agents having power and authority so to do, and were by it thereunto duly appointed and authorized, made and executed several written instruments, and delivered the same to divers persons, parties and corporations, and thereby bargained and sold to such persons,

parties and corporations the several tracts of land in the aforesaid petition mentioned, and granted and conveyed the same to such persons, parties and corporations by written instruments by it, the United States aforesaid, duly executed.

Third. And for a third and further ground of defense in this behalf said defendant avers that said plaintiff had notice of and knew the title to, and who and what were the legal and equitable owners of the several tracts of land in the aforesaid petition mentioned.

Fourth. And for a fourth and further ground of defense in this behalf the said defendant avers that at the several supposed times in the aforesaid petition mentioned said plaintiff had notice of and knew of the Act of Congress entitled, "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other Purposes," approved July 1st, 1862, and of the Act of Congress entitled, "An Act to amend an Act entitled, An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for Postal, Military and other Purposes," approved July first, eighteen hundred and sixty-two; approved July 2, 1864.

Fifth. And for a fifth and further ground of defense in this behalf said defendant refers to all and singular the above and foregoing parts of this answer as part thereof, and avers that all and singular the above and foregoing parts of this answer, as part hereof, and avers that all and singular the allegations and averments in this answer above made are true; and said defendant further avers that before the several supposed times in the aforesaid petition mentioned the Kansas Pacific Railway Company, otherwise known as and called the Union Pacific Railway Company, Eastern Division, formerly the Leavenworth, Pawnee and Western Railroad Company, had made and executed divers written instruments, and delivered the same to the National Land Company, and thereby sold and disposed of the several tracts of land in the aforesaid petition mentioned, to the National Land Company aforesaid; and said plaintiff, for and on behalf of, and as Agent, General Manager and Treasurer of the National Land Company aforesaid, for the purpose of re-

deeming and to redeem for it the several tracts of land in the aforesaid petition mentioned from the supposed sales thereof in the said petition mentioned, and for it to pay all such taxes, if any, as had been assessed against said lands or any thereof voluntarily paid all such sums of money, if any, as he ever paid into the County Treasury of said county or for any supposed certificate in said petition mentioned or for any supposed purpose whatever.

Sixth. And for a sixth and further ground of defense in this behalf said defendant avers that all such of the supposed sums of money in the aforesaid petition mentioned as said plaintiff ever paid were by him voluntarily paid, for and on behalf and with the moneys of persons, parties and corporations claiming at the time to be owners of the several tracts of land in said petition mentioned, for the purpose of paying such taxes as had been assessed on or against said tracts of land, or any thereof, and of redeeming the same from any sale thereof.

Seventh. And for a seventh and further ground of defense in this behalf said defendant avers that before and at the several supposed times in the aforesaid petition mentioned there had been paid into the Treasury of the United States the cost of surveying, selecting and conveying the several tracts of land in the above petition mentioned by the party in interest and also by the Railroad Company in this answer above mentioned.

And this defendant refers to all and singular the above and foregoing parts of this answer as part hereof.

And said defendant further avers that before the several supposed times in said petition mentioned, the United States of America, by its proper officers and agents, in that behalf by it thereunto duly appointed and authorized, made and executed divers certain written instruments, and thereby acknowledged and stated that there had been paid into the Treasury of the United States the cost of surveying, selecting and conveying the aforesaid tracts of land by the said company and also by the party in interest.

Eighth. And for an eighth and further ground of defense in this behalf said defendant avers that the National Land Company, claiming to be the owner of the several supposed tracts of land in the aforesaid petition mentioned, and, as owner thereof, voluntarily paid into the County Treasury

of the said County of Dickinson such of the several supposed sums of money in the aforesaid petition mentioned as were ever paid therein, and said Company paid the same for the purpose of redeeming each of said tracts of land from every supposed sale thereof in said petition mentioned, and to pay such taxes as had been assessed or levied against such tracts of land or any of them, and for such of said several supposed sums of money as was paid into said Treasury on that eighth day of January, A. D. 1872, a good and sufficient certificate of redemption of each of said tracts of land from the supposed sale thereof in said petition mentioned was, at the request of the National Land Company aforesaid, duly executed and issued, by the proper officers of said county, the County Treasurer and County Clerk thereof, and delivered to the National Land Company aforesaid, and a good and sufficient receipt for such taxes as has been levied or assessed against said several tracts of land, or any of them, for or during the year A. D. 1871, was by the proper officer of said county, the County Treasurer thereof, duly executed and delivered to the National Land Company aforesaid, and said plaintiff afterwards, without paying any sums of money and without any right so to do, procured the several supposed certificates in said petition mentioned to be delivered to him without consideration.

And said defendant further avers that the National Land Company aforesaid voluntarily paid all such of the several supposed sums of money in said petition mentioned as were ever paid, into said County Treasury for the purpose of redeeming said tracts of land from every supposed sale thereof, and to pay all such taxes as had been levied or assessed against said tracts of land or any thereof.

Ninth. And for a ninth and further ground of defense in this behalf said defendant further admits and avers that all and singular such of the supposed taxes in the aforesaid petition mentioned, as any of the tracts of land in said petition mentioned were ever sold for, and also such as were ever paid, were duly levied and assessed on and against the tracts of land in said petition mentioned, or some one or more of them, by competent authority, with authority so to do, some by the State of Kansas and some by proper officers, boards or bodies of the above named county, or other authority thereunto authorized, with authority so to do, and that the same were voluntarily paid, as is in this answer above alleged.

Tenth. And for a tenth and further ground of defense in this behalf said defendant refers to all and singular the above and foregoing parts of this answer as parts hereof, and avers that the above mentioned Railroad Company had, before the several supposed times in said petition mentioned, completed each of the forty consecutive miles of that portion of its railroad and telegraph line on the sides of which the lands aforesaid lie and are situate, ready for the service contemplated by the Acts above mentioned, and supplied the same with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first class railroad, the rails and all the other iron used in the construction and equipment thereof being American manufacture of the best quality. And the President of the United States had, by a written instrument by him executed, appointed three commissioners to examine the same and report to him in relation thereto, and before the several times aforesaid it appeared to him, said President, that each of the forty consecutive miles aforesaid of the railroad and telegraph line aforesaid, had been completed and equipped in all respects as required by the Acts aforesaid, and before then, and after said appointment, written certificates of said commissioners to that effect were duly made and issued and by them duly execucuted and delivered to the President aforesaid as required by the Acts aforesaid.

And said defendant further avers that there was also before the several times aforesaid presented to said President a written statement executed and verified on oath by the President of said company, that each of said forty miles had been completed in the manner required by said Acts, therein setting forth with certainty the points where each of said forty miles began and where the same end, which oath was taken before a Judge of a Court of Record.

And said defendant further avers that before the several times aforesaid the United States gave, granted and conveyed the lands aforesaid to said Railroad Company, and that the lands aforesaid were the property of the National Land Comany at the several supposed times in said petition mentioned.

CLOUGH & WHEAT,
Attorneys for Defendant.

Reply Filed April 17th, 1874.

And now comes the plaintiff above named by Pratt & Ferrey, his Attorneys, and for a reply to the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth defenses of the answer of the above named defendant filed herein, denies the same and each and every allegation in said defenses contained.

PRATT & FERREY,
Att'ys for Pl'ff.

Special Findings of Fact, June 9th, 1876.

This day the parties by written stipulation waive a jury and submit this cause to the Court, and the Court, having heard the evidence in consideration thereof, finds the following facts specially, to wit:

First. That on the 8th day of January, A. D. 1872, the plaintiff paid into the County Treasury of said Dickinson County the sums of money stated in the several counts in the petition as having been paid on that day, and on August 23, 1872, and April 4, 1872, also paid into the County Treasury of said county the sums of money stated in the 39th and 57th counts in the petition as having been paid in those days, and received the tax sale certificates in the petition stated. The following is a copy of the certificate mentioned in the first count in the petition:

Certificate No. 1.

I, J. B. Shane, County Treasurer of Dickinson County, in the State of Kansas, do hereby certify that the following described real estate, to wit: S. E. ¼ of 3, 11, 2, was on the 2nd day of May, A. D. 1871, sold by me at public auction, at my office, in Abilene, to Dickinson County, for the sum of 12.90 dollars, being the full amount of tax and charges due upon said real estate for the year 1870; and I further certify that C. B. Lamborn has this day paid into the County Treasury of said county the sum of seventeen and $\frac{66}{100}$ dollars, and that the said C. B. Lamborn, his heirs and assigns, will, on the 2nd day of May, A. D. 1874, be entitled to a deed therefor from Dickinson County, unless said real estate shall have been redeemed as provided by law.

Given under my hand at my office, in Abilene, Dickinson County, State of Kansas, on this 8th day of January, 1872.

[Signed] J. B. SHANE,
County Treasurer.
ED GAY, *D.*

I, M. P. Jolley, County Clerk of said county, in consideration of the above certified payment of seventeen and $\frac{66}{100}$ dollars, do hereby assign all the right, title and interest of said Dickinson County to the above certificate to C. B. Lamborn, and I hereby certify that this assignment has been duly entered on my Duplicate Book of Tax Sales in my office.

Given under my hand and official seal on this 8th day of January, A. D. 1872.

[Signed] M. P. JOLLEY,
County Clerk.

[SEAL.]

The other certificates are in the same form, differing only as to amounts and descriptions of lands, except the certificates mentioned in counts 39 and 57, which are dated respectively August 23rd, 1872, and April 4th, 1872.

Second. No deed has ever been received by the plaintiff on any of his certificates, nor has he ever demanded any deed. But on the 2nd day of January, 1874, the plaintiff offered to return said tax sale certificate to the County Treasurer of said county, and at the same time demanded of said Treasurer that he refund to said plaintiff the money so as aforesaid paid by him into the County Treasury, and all payments of taxes thereafter made on such lands, with interest at the rate of ten per cent. on such payments, which was then and there refused by said Treasurer.

Third. The plaintiff Lamborn holds the said certificates and each of them as trustee for the National Land Company, hereinafter mentioned, and the money paid for said certificates was the money of the said National Land Company, of which said plaintiff was at the time President.

Fourth. After said certificates were received the plaintiff paid the subsequent taxes on a portion of said lands at the times and in the amounts stated in the petition.

Fifth. All the lands mentioned in said certificates are situate in Dickinson County, and within the twenty mile limit of the land Grant by Congress, under the Act of July

1, 1862, and July 2, 1864, to the Railroad now known as the Kansas Pacific Railway Company, being the same road mentioned in said Act of 1862 as the Leavenworth, Pawnee and Western Railroad Company, and the same road mentioned in the Act of July 2, 1864, as the Union Pacific Railway Company, Eastern Division. None of the said lands had been patented by the United States to said Company at the time when the same were sold for taxes, as specified in said certificates, nor at the time when the taxes thereon were so subsequently paid by the plaintiff, nor had the costs of surveying, selecting and conveying the same been paid by the said Company nor any part in interest prior to the time when the said lands were sold and taxes so as aforesaid paid thereon by said plaintiff.

Sixth. The National Land Company is a corporation organized under the laws of the State of Missouri, and on the first day of September, 1868, and at different times between that time and the 29th day of June, 1870, entered into contracts with said Railroad Company for the purchase of large quantities of the lands of said Railroad Company, including among others the lands in Dickinson County and the lands in respect to which this controversy arises.

Seventh. The National Land Company, after procuring these contracts from the Railroad Company, sold a portion of the lands, in respect to which the taxes in suit are claimed, to divers third persons under executory contracts to make titles, when payment should be made therefor, the said purchasers agreeing as between themselves and the National Land Company to pay the taxes on the lands, which they failed to do, and the taxes became delinquent and the lands were sold, as shown in said certificates. The contracts between the Railroad Company and the National Land Company contain the following provision in regard to taxes, to wit:

"The said National Land Company agrees with the said Kansas Pacific Railway Company to make punctual payment of the several sums due or to become due to the Kansas Pacific Railway Company under the contract, and to regularly and seasonably pay all such taxes and assessments as may hereafter be lawfully imposed on said lands." All of said cotracts between the National Land Company and the Railway Company in respect to purchases of land by the

Land Company were entered into after the taxes on the said lands had been levied for the year 1868."

Eighth. That on the A. D. a suit was instituted in the State Court of Kansas by the Kansas Pacific Railway Company against one Prescott, to try the right to tax the lands of the Railway Company under the authority of the State which suit was on 18 , decided in favor of Prescott by the Supreme Court of the State, whose judgment was on reversed by the Supreme Ccurt of the United States, the fact of the pendency of that litigation between Prescott and the Railway Company, in respect to the taxability of the lands of the Railway Company, that the County and State authorities, on one hand, claimed that these lands were taxable and that the Railway Company contested that claim were known to the plaintiff and to the National Land Company when the plaintiff acquired said certificates, and his purpose in acquiring them were, if said lands were taxable, to prevent tax titles accruing upon the said lands, and if found to be not taxable, with a view to bringing actions to recover back the money so paid.

Ninth. That said contracts between the Railroad Company and the National Land Company also provided as follows: "And the first party—Railroad Company—agrees, upon request in writing from the second party,—meaning the National Land Company aforesaid — to convey by deed or general warranty, in the form it has adopted for conveying its Congressional lands, any of the lands purchased by the second party under this agreement, whenever the purchase money and interest and the necessary stamps for such deeds are furnished by the second party."

And said contracts were made in pursuance of an agreement made on the 25th day of June, A. D. 1868, between the said Railroad Company and the National Land Company aforesaid, which contract of June 25, 1868, including a sale of twenty thousand acres of land by said Railroad Company to said Land Company, thereafter to be selected by said Land Company, and also provided that said Land Company was to have the privilege of selecting and purchasing, from time to time thereafter, one hundred and eighty thousand acres more of said Railway Company.

The Court thereupon takes time to consider of the proper judgment to be rendered herein, the cause to be argued by

counsel on written briefs, the counsel for plaintiff to file their brief with the clerk on or before July 15, 1876; the counsel for defendant to file their brief in answer with the clerk on or before August 10, 1876, and counsel for plaintiff to file brief in reply with the clerk on or before August 20, 1876, and by consent of parties time is given defendants until any time during the next term of this Court, and within three days after rendition of judgment herein, in which to present its bill of exceptions herein as to its claims and matters excepted to during the trial at this term of Court and cause continued till next term.

Judgment and Certificate of Division Nov. 29, 1876.

This cause having been argued by counsel the Court, on consideration, finds as a conclusion of law from the special findings of facts made at the last term of this Court that the plaintiff is not entitled to recover. It is therefore considered and adjudged that the defendant herein go hence without day and recover of and from the plaintiff herein its costs in this action expended and have hereof execution.

And on the trial or hearing of the said suit, certain questions occurred upon which the opinions of the judges were opposed, and the points upon which they so disagreed were stated under the direction of the judges, and certified, and such certificate was ordered to be entered of record, and is in the words and figures following, viz:

Be it remembered, that at a regular term of the Circuit Court of the United States for the District of Kansas, begun and held at the city of Topeka, in the State of Kansas, on the twenty-seventh day of November, A. D. 1876, when there were present holding the Court, the Honorable John F. Dillon, Circuit Judge, and the Honorable C. G. Foster, District Judge, and in a certain civil suit therein pending wherein Chas. B. Lamborn is plaintiff and the Board of County Commissioners of the County of Dickinson is defendant, (a final judgment having been entered therein for defendant) in the trial on hearing whereof certain questions occurred upon which the opinions of the said judges were opposed.

Now this is to certify that the points upon which said judges so disagreed are stated under the direction of the judges, and certified as follows, to wit:

Upon the foregoing special findings of facts in said suit the judges of the Circuit Court were opposed in opinion upon the following points of law therein arising:

1. Whether judgment should be rendered for the plaintiff or for the defendant.

2. Whether the acquisition of said tax certificates and the subsequent payment of taxes by the plaintiff was a voluntary payment of the money now sought to be recovered back in such a sense as to defeat the right to such recovery.

3. Whether the Statute of Kansas (General Statutes of Kansas, page 1058, secs. 120 and 121) gives the right upon the facts above found to the plaintiff to recover in respect of the causes of action set out in the petition.

The judges being thus divided in opinion, at the request of counsel, hereby certify such division of opinion to the Supreme Court, pursuant to the Statute in such case provided.

JOHN F. DILLON.
C. G. FOSTER.

Record duly brought up by Citation and Writ of Error.

BRIEF.

The case really presents but a single question for consideration by the Court, but it is one of considerable importance, and on its decision depends the result of a number of similar suits now pending in the Kansas courts.

In Kansas, as in most of the Western states, when the tax assessed on a piece of land is not duly paid the tract is sold by auction to the person who will pay the taxes and penalties for the smallest part of it, and if there be no other purchaser is bid off by the county, and to the purchaser, either at the auction or subsequently from the county, a tax sale certificate is given.

This certificate entitles the holder to a deed of the land in fee simple absolute at the expiration of three years, unless in the meantime the certificate is redeemed by payment of the original tax and all subsequent taxes paid by the holder of the certificate with penal interest.

If for any reason the tax sale certificate or the deed founded on it do not pass the title, the elaborate provisions of the Kansas law secure to the owner of it the return of the amounts paid for purchase of the tax title with moderate interest.

The plaintiff in error was agent of or trustee for the National Land Company, which claimed to be entitled to some eighty tracts of land described in the petition, but it was doubtful whether their title was good and whether the land was not still in fact the property of the United States. The Land Company, therefore, did not pay the taxes, but allowed the lands to be sold, and when bid off by the county,

through plaintiff bought the tax sale certificates from the county, with the object of obtaining back their money if it turned out that the land belonged to the United States, and that the Land Company had no valid title.

Plaintiff, with the Company's money, paid several years' subsequent taxes, and obtained their indorsement on his certificates as further charges secured by the tax liens.

Then this Court, reversing the State Supreme Court, decided that the title to the land had not passed from the United States, consequently that the Land Company had no title, and that the land was not subject to State taxation; and as the county could thus give no tax title and refused to refund, the Land Company cause this suit to be brought to get back their money.

The theory of the case presented by counsel for defendant below was that the purchase of a tax sale certificate on a tract of land by a person claiming to be entitled to that tract was in fact a voluntary payment of the tax which could not therefore be recovered back.

The Court below adopted this theory, thus holding the affirmative upon the second question certified:

"Whether the acquisition of said tax certificates and the subsequent payment of taxes by the plaintiff was a voluntary payment of the money now sought to be recovered back in such a sense as to defeat the right to such recovery."

The first and third points certified depend for their solution on the general principle involved in the decision of this question.

Our position on the other hand is that the purchase of the tax sale certificate creates an express contract between the county and the purchaser by which the

county agrees with the purchaser either to give him a good tax title or to refund the purchase money.

The transaction is not a payment at all; it is the purchase of a lien upon the land, and the lien, except that it gives no right of possession, is a true mortgage, and if not discharged enables the lien holder, when the redemption day has passed, to acquire without action, the absolute fee simple of the land, free from any equity of redemption.

Such a lien is a new source of a paramount and indefeasible title, and—at least in Kansas—is frequently acquired by persons holding land under doubtful or disputable titles, in order to secure themselves against ejectment by an adverse claimant.

All the natural justice of this case is obviously with the Land Company, and not with the county; the latter has received the tax on some eighty tracts which were not subject to taxation; it received them on an express promise to make a tax title to the tracts or refund the money, and it is now unable to do the one and refuses to do the other.

Our action is analogous to a suit to recover back money paid on a contract where there has been a total failure of consideration, or a suit to recover back purchase money on a breach of warranty.

After setting out the relevant provisions of the Kansas laws it will be convenient to present the propositions submitted for consideration as follows:

I. Obtaining a tax title is not a payment of a tax, but a purchase of a lien upon the land.

II. Nor is it in any sense a voluntary payment.

III. Such a title can be acquired by any one, but if obtained by one holding a fiduciary relation to another he will hold it on trust for his beneficiary.

IV. In Kansas a tax on land creates no debt and imposes no obligation on the owner or possessor.

V. No such fiduciary relation exists between a claimant or possessor and the taxing authority as to prevent the former contracting with the latter for a tax title.

VI. And if the taxing authority cannot perform its contract the tax purchaser is entitled to a return of his purchase money, first on the ground that there is a total failure of consumation.

VII. And further by the express terms of the statutory contract.

VIII. No principle of natural justice can be invoked to show that the Land Company should lose both its derivative title and its tax title also.

IX. It would be inequitable for the county to retain money to which it is now conceded it had no original right.

X. No questions of fact are open in this Court.

I. Kansas Laws.

The Kansas tax law in force during these transactions is comprised in Chap. 107 of the General Statutes. (L. 1868, pp. 1019—1064.)

Sec. 80. All lands and lots on which the taxes shall not have been paid before the tenth day of January in each year shall be subject to sale, as hereinafter provided.

Sec. 81. The county treasurer shall, between the first and the tenth of March, in each year, make out a list of all lands and town lots subject to sale, describing such lands and town lots as the same are described on the tax roll, with an accompanying notice, stating that so much of each tract of land or town lot, described in said list, as may be necessary for that purpose, will, on the first Tuesday of May, next, thereafter, and the next succeeding days, be sold by him, at public auction, at his office, for the taxes and charges thereon.

Sec. 85. The person at such sale offering to pay the taxes and charges against any one piece or parcel of land for the smallest quantity of land in a square, as nearly as practicable, off from the northeast corner of the tract or piece of land, shall be the purchaser of such quantity, located as aforesaid.

Sec. 86. If no one will bid for a less quantity than the whole, the treasurer may sell any tract or piece of land to any one who will take the whole of such tract or piece of land and pay the taxes and charges thereon.

Sec. 88. If any parcel of land cannot be sold for the amount of tax and charges thereon, it shall be bid off by the county treasurer, for the county, for such amount.

Sec. 90. The county treasurer shall give to each purchaser, on payment of his bid, a certificate, dated the day of the sale, describing the lands purchased, the amount paid therefor, and the time the purchaser will be entitled to a deed; which certificate will be assignable, and any person's interest therein may be transferred by a written assignment, indorsed upon or attached to the same; and such assignment shall have the same force and effect as the assignment of bonds for the conveyance of lands; and such certificate, if acknowledged by the treasurer, and certified by a person authorized to take acknowledgment of deeds, may be recorded in the office of the register of deeds of the proper county. All assignments shall be entered on the treasurer's sale book, and the clerk's duplicate.

Sec. 91. When any land or town lots shall, at any tax sale, be bid off by the county treasurer, for the county, it shall be the duty of the county treasurer to enter the same on the book of tax sales, in the same manner as though such land or town lots were sold to other purchasers; and he shall number each tract of land or town lot, consecutively, in like manner as though a certificate of sale had been made. Whenever any person shall pay into the county treasury a sum of money, or warrant of appropriate fund, or county orders, equal to the cost of redemption at that time, of any such tract of land or town lot, the county treasurer shall give such person a certificate, dated the day when it was issued, describing the land or town lot bid off for the county, the amount for which it was so bid off, the amount paid into the county treasury by such person for such tract of land or town lot, the time when the owner of such certificate will be entitled to a deed, and shall number said certificate to correspond with the number of the tract of land or town lot, as numbered in the book of tax sales, which certificate, before it shall be of any

validity, shall be assigned to such person by the county clerk, who shall make an assignment on his duplicate book of tax sales, and such certificate, so assigned by the county clerk, shall vest all the interest of the county in or to such land or town lot, in such person; and such certificate shall be assignable to the same extent and in like manner as certificates given to purchasers at tax sales.

Sec. 92. When any lands or town lots are offered for sale for any taxes, it shall not be necessary to sell it as the property of any person or persons; and no sale of any land or town lot for taxes shall be considered invalid on account of its having been charged on the tax roll in any other name than that of the rightful owner; but such land must be, in other respects, sufficiently described on the tax roll, and the taxes for which it is sold be due and unpaid at the time of such sale.

Sec. 96. All lands and town lots bid off for the county at any tax sale, shall continue liable to be taxed in the same manner as if it were the property of individuals, and such taxes and charges shall be a lien upon such lands and town lots; but no land or town lots, so bid off for the county shall be sold for any taxes levied subsequent to such bid until they shall have been redeemed, or shall be sold by the county, or the tax certificates issued to the county shall have been assigned. If the subsequent taxes shall not be paid by any other person, such lands and town lots, of the value of ten dollars and upwards, shall be advertised with and in the same manner, as the other lands, and town lots on which the taxes are not paid, and shall be subject to the same charges as if they should be sold. The treasurer shall enter such taxes and charges in the book of tax sales of the year in which said lands were sold to the county, opposite such lands or lots, and such taxes and charges shall constitute an additional lien. All tracts of land and town lots of less value than ten dollars, so bid off by the county, shall not again be advertised or sold unless so ordered by the board of county commissioners.

Sec. 97. Any person desiring to pay any subsequent taxes on any lands or town lots for which he holds the tax certificate shall produce such certificate to the treasurer who shall endorse thereon the amount of such subsequent tax and the date of payment thereof; and the treasurer shall also enter such amount, and the date of payment thereof, in the book of tax sales opposite such lands and town lots.

Sec. 112. If any land sold for taxes shall not be redeemed within three years from the day of sale the County Clerk of the county where the same was sold, shall, on presentation to

him of the certificate of sale, execute, in the name of the county, as County Clerk, under his hand and seal of the county, to the purchaser, his heirs and assigns, a deed of the land so remaining unredeemed, and shall acknowledge the same, which shall vest in the grantee an absolute estate in fee simple in such lands, subject however, to all unpaid taxes and charges, which are a lien therein, and such deed, duly acknowledged or proved, shall be prima facie evidence of the regularity of all proceedings, from the valuation of the land by the assessor, inclusive, up to the execution of the deed, and may be recorded with the like effect as other conveyances of land. Said deed shall be substantially in the following form: "Know all men by these presents: That, whereas, the following described real property, viz:.....situated in the county of.....and State of Kansas, was subject to taxation for the year (or years) A. D.....; and whereas, the taxes assessed upon the real property for the year (or years) aforesaid, remained due and unpaid at the date of sale hereinafter mentioned; and whereas, the treasurer of said county did, on the..day of....., A.D....., by virtue of authority in him vested by law, at (an adjourned sale of) the sale begun and publicly held on the first Tuesday of....., A.D....., expose to public sale, at the county seat of said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of taxes, interest and cost then due and unpaid upon said property; and whereas, at the place aforesaid, A. B. of the county of...., and State of....., having offered to pay the sum of....Dollars and..cents, being the whole amount of taxes, interests and costs then due and remaining unpaid on said property, for (here follows a description of the property sold), which was the least quantity bid for; and payment of said sum having been made by him to the said treasurer, the said property was stricken off to him at the price; and whereas, said A. B. did, on the..day of....., A.D....., duly assign the certificate of the sale of the property as aforesaid, and all his right, title and interest to said property, to E. F. of the county of.....and State of.....; (and when subsequent taxes have been paid, add the following): and whereas, the subsequent taxes of the year.., amounting to the sum of.....Dollars, have been paid by the purchaser, as provided by law; and whereas,....years have elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law: Now therefore, I, C. D., County Clerk of the county aforesaid, for and in consideration

of the sum of.....Dollars and.....cents, taxes, cost and interest due on said land for the year.., to the treasurer as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said A. B. (or E. F.), his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said A. B. (or E. F.) his heirs and assigns forever, subject, however, to all rights of redemption provided by law. In witness whereof I, C. D., County Clerk as aforesaid, by virtue of authority aforesaid, have hereunto subscribed my name and affixed my official seal of this county on this..day of....., A.D....., C. D., County Clerk.

"*The State of Kansas,.... County, ss.*

"I hereby certify that before me,....., a....., in and for said county, personally appeared the above-named C. D., Clerk of said county, personally known to me to be the Clerk of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as Clerk of said county, and who acknowledged the execution of the same to be his voluntary act and deed, as Clerk of said county, for the purpose therein expressed.

"Witness my hand and seal this..day of....., A. D....."

Sec. 117. If the holder of a tax deed, or any one claiming under him by virtue of such tax deed, be defeated in an action by or against him, for the recovery of the land sold, the successful claimant shall be adjudged to pay to the holder of the tax deed, or to the party claiming under him by virtue of such deed, before such claimant shall be let into possession, the full amount of taxes paid on such lands, with all interests and costs as allowed by law up to the date of such tax deed, including the costs of such deed and the recording of the same, with interest on such amount at the rate of twenty per cent. per annum, and the further amount of taxes paid after the date of such deed, and interest thereon at the rate of twenty-five per cent. per annum.

Sec. 120. If the county treasurer shall discover, before the sale of any lands for taxes, that, on account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer such lands for sale; and if, after any certificate shall have been granted upon such sale, the county clerk shall discover that, for any error or irregularity, such land ought not to be conveyed, he shall not convey the same, and the county treasurer shall, on the return of the tax cer-

tificate, refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum.

Sec. 121. If, after the conveyance of any land sold for taxes, it shall be discovered or adjudged that the sale was invalid, the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded, with interest on the whole amount at the rate of ten per cent. per annum, upon the delivery of the deed to be cancelled; and in all such cases, where the county treasurer shall have offered to the person entitled thereto his money, as aforesaid, and such person shall refuse to receive it and cancel the deed, he shall not be entitled to receive any interest on the money so paid by him, after the day of such offer and refusal, nor shall any recovery ever be had against the county on the covenants of such deed.

Sec. 136. In case taxes are paid by any party whose lands are in controversy in any of the courts of this State, and the party so paying shall fail to recover said lands, he shall be entitled to collect from the parties recovering, the taxes so paid with the interest thereon; and the taxes so paid shall be a lien on any such land.

II. Purchase of Certificate not Payment.

In the elaborate argument filed below by counsel for defendant, they said, "We claim that because of the interest of the National Land Company (Lamborn being only trustee therefor paying its money), the payments made are in effect mere voluntary payments of taxes, and even if the lands were not taxable, there can be no recovery back." And again, "When the money was paid to prevent tax titles from accruing upon the lands, that was the end of the matter, under the rule in relation to voluntary payments."

Such a statement involves an obvious misapprehension of terms; payment means a transfer of money in extinction of an obligation and like all other con-

ventional acts takes its effect from the will of the actor. A man does not pay his debt when he transfers money to a creditor for another purpose. The rights of the debtor and creditor remain distinct but subject of course to the exercise of the right of set off by either party.

Lamborn obviously did not intend to pay the taxes on the specified tracts and extinguish the tax lien upon them when he bought the certificates, nor did the county treasurer then understand the payment to have that effect or he would not have assigned the tax title to Lamborn. That the tax lien was not extinguished is clear for it will not be disputed that Lamborn could have sold his certificates to a bona fide purchaser whose rights would not have been affected by Lamborn's fiduciary character or the claims of the National Land Company or its purchasers to the lands in question.

In *Kingston Bank* v. *Gay*, *19 Barl.*, *459*, it is said "to constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor *for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose.*"

So in *Martin* v. *Quinn*, *37 Cal.*, *58*, it is held that "the payment of a debt by a person not legally responsible for it is a satisfaction of the debt, *if the money is accepted for that purpose.*"

Thus the original transaction was not a payment at all, nor do we seek to recover back the money on the ground that it was a payment made under a mistake, or under compulsion, or under protest, and it is irrelevant to argue, as was urged by defendant's counsel below, that "under the circumstances there is no mistake of fact and a party cannot plead ignorance of law."

The purchase of a tax sale certificate is assimilated by Kansas law to the taking of a title bond; it has even been said that the tax sale certificate carries the estate and that the tax sale purchaser becomes the owner, subject to redemption, *Stebbins* v. *Guthrie*, *4 Kan.*, *353*. And an assignment of the certificate has the same effect as the assignment of a title bond. (*Sec. 90*, *ante. p. 19*, *Judd* vs. *Driver*, *1 Kas.*, *455*.) And certainly if the obligor of a title bond could make no title, he could not retain the purchase money on the ground that the obligee had claimed title himself.

If defendants have a good answer to our claim to recover back our money it must be either on the ground that the Land Company is equitably indebted to the county for the taxes on the lands in question and that the county can set off such debt against the demand of the Land Company to recover back the money paid for the invalid tax certificates, or that the claim of the Land Company to the lands estops them, for some reason or another, from recovery.

Moreover, "tout payement suppose une dette" (Code Nap., art. 1235), and it is now settled that there was nothing due to the county for taxes on the lands in question, and therefore no debt to be paid was in existence.

Much stress was laid by the other side below on the maxim that, "ignorantia juris non excusat," yet their then ignorance of the law is the only ground they can put forward to excuse their alleging the existence of any debt for taxes at all. It may be doubted if any such technical application of this rule is proper in the present case. (See *Marsh* v. *Whitmore*, *21 Wall*, *178*.) But if it is, it should estop the county from now making any claim whatever for taxes, equitable or otherwise.

In short, all questions relating to payment, properly so called, are outside of the questions involved in this case.

III. No Voluntary Payment.

Still less can it be said that there was any voluntary payment. "All *payments* of taxes are supposed to be voluntary which are not made under protest or under the apparent compulsion of legal process. When a protest is relied on nothing very formal is requisite: taxes illegally assessed may always be recovered back if the collector understands from the payor that the tax is regarded as illegal, and that suit will be instituted to compel the refunding." Cooley, p. 568.

So far as there is any analogy between payment and the purchase of a tax certificate, the latter transaction is similar to a payment under protest: for the provisions of the statute are a warning to the county and the treasurer that if the tax sale certificate is invalid, the purchaser will be entitled to have his money refunded to him.

Selling the property is certainly a species of compulsion; a person paying taxes under protest to avoid a sale might recover them back; and it is not easy to see why buying the tax title should be a transaction of a more voluntary character. Redeeming a tax certificate has been held to be a voluntary payment of a tax, though made under protest. *Phillips* v. *Jefferson County*, 5 *Kas.*, 412. But the distinction is obvious. By redeeming the certificate the owner admits the title of and pays off the lien holder, and yet by protest tries to fix the county with a liability which is inconsisten with such payment.

Other Kansas cases on involuntary payment of taxes are *Wabaunsee Co.* v. *Walker*, *8 Kas.*, *431*. *K. P.* v. *Wyandotte Co.*, *16 Kas.*, *587*.

IV. A Tax Title May be Acquired by Any One.

No distinction can be drawn in Kansas between persons who can and who can not acquire a tax title. Any one may acquire the interest of the State in the tax lien, but in many cases the tax title will be held on trust for other persons to whom the tax purchaser stands in such a fiduciary relation that he can not make use of his paramount tax title to divest their rights. It is sometimes said that such persons can not take a tax title; but such a statement of the rule is inaccurate. They are under no incapacity to take the tax title — the title in their hands is perfectly good — but they hold it on trust, and can not therefore make use of it against their cestuique trusts, but may against any one else.

In Judge Cooley's able work, (p. 345) he thus deals with the question as to who may acquire tax titles:

"Some persons, from their relations to the land, or to the tax, are precluded from becoming purchasers. The title to be transferred on such a sale is one based on the default of the person who owes to the government the duty to pay the tax. But one person may owe this duty to the government and another may owe it to the owner of the land. Such a case may exist where the land is occupied by a tenant who, by his lease, has obligated himself to pay taxes. Where this is the relation of the parties to the land it would cause a shock to the moral sense if the law were to permit this tenant to neglect his duty and cut off his lessor's title by buying in the land at a tax sale. So the mortgagor, remaining in possession of the land, owes it to the mortgagee to keep down the taxes; and

the law would justly be chargeable with connivance at fraud and dishonesty if a mortgagor might allow the taxes to become delinquent, and then discharged them by a purchase which would at the same time cut off his mortgage. There is a general principle applicable to such cases: that a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party by a neglect of the duty which he owed to such third party. This principle is universal and is so entirely reasonable as to scarcely need the support of authority. Show the existence of the duty and the disqualification is made out in every instance."

See in Kansas, *Carithers* v. *Weaver*, *7 Kas.*, *110*, (purchase by tenant.) *Krutz* v. *Fisher*, *8 Kas.*, *90*, (by agent).

Again (p. 348):

"Whether one should be precluded by the naked fact that he claims title to the land or that he has possession of it from making a purchase in extinguishment of the rights of another with whom he stands in no contract or fiduciary relations is a question often touched by the discussion of the Courts without having as yet been very fully or comprehensively examined. So far as the cases hold that one who ought as between himself and some third person to pay the taxes shall not build up a title on his own default, the principal is clear and well founded in equity. But when one owes no duty to any other in respect to the land it is not clear upon what principle of equity or of estoppel such other is to set up as against him his neglect to perform in due season his duty to the government."

The general rule is clearly and concisely laid down in a recent case (*Blackwood* v. *Van Vliet*, *30 Mich.*, *121*):

"To preclude a person from making and relying upon a purchase of lands at tax sale, there must be something in the circumstances of the case which

imposes upon him a duty to the State to pay the tax or something which renders it inequitable, as between himself and the holder of the existing title that he should make the purchase."

Now, in Kansas, no owner or occupant of land is under any personal duty to the State to pay the taxes upon it. And so far is this view carried that if a person claiming to own land voluntarily pays the taxes, and is ejected by one having a paramount title, the taxes thus voluntarily paid are a lien against the paramount title. *Tax law, sec. 136, ante. p. 23.*

Cooley concludes, p. 350:

"It is difficult to dispute the truth of what is said by the Supreme Court of Pennsylvania, that '*there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes.*'"

This view has been adopted in Kansas, and an examination of the numerous and often unreconcilable authorities in other States is therefore unnecessary.

V. Tax on Land creates no Debt.

In many States, as in California and Iowa, the tax on land is assessed to a particular person as owner or occupant (see *Crawford* v. *Schmidt, 47 Cal., 617*); he becomes a debtor to the State for the tax, and judicial proceedings may in some cases be had to enforce his liability. But by the Kansas law, no personal obligation is imposed on the owner, and whether the tax is assessed to him or not is of no importance. See sec. 92 of tax law quoted above, p. 20, and *Bowman* v. *Cockrill*, post. The land only is held liable for it and there is no debt

from any individual which can be set off against any claim by him.

To make the validity of the tax title depend on its not having been acquired by the owner of some former title, or a possessor, or claimant of the land, would be to make an exception that the law ignores, and to introduce on questions of contested title an inquiry into matters entirely outside the record of the tax proceedings or the knowledge or duties of the officers. As is said in *Gwynne* v. *Niswanger*, *20 O., 564:* "A tax title from its very nature has nothing to do with the previous chain of title: does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title, in proving it, goes no further than his tax deed. The former title can be of no service to him, *nor can it prejudice him.*" In fact the Kansas law leaves it altogether uncertain whether the liability for the tax on land is upon the owner or occupant, or rather wholly ignores the existence of any personal liability by any one.

It is further noticeable that the seventh finding of fact (Abstract, ante. p. 11) shows that were there any liability for taxes incumbent upon claimants to the lands it was not upon the Land Company but upon the purchasers from them, as well by their contract with the Land Company as by their claim to the equitable ownership as purchasers, and that the Land Company was under no obligation to these parties to pay taxes, but the contrary, and hence was in a position to take tax titles, which would have barred their rights.

The language of the seventh finding is not free from ambiguity, but it seems to mean that the Land Company sold to various third persons a portion of

the lands bought from the railroad company, which portion are the lands in respect to which the taxes in suit are claimed.

Even in those States where possession with claim of ownership prevents the acquisition of the tax title, the disqualification would have laid, not on the Land Company, but on the purchaser from it. Indeed, the seventh finding expressly states that the taxes became delinquent because the purchasers from the Land Company failed to pay them as they had agreed.

That the Land Company had contracted with the railroad company to pay taxes, was a matter that would prevent the former acquiring any valid tax title against the latter, but is of no effect as to third parties.

But, as it is settled that none of these parties had any title to the land and that no taxes at all were payable in respect of the land, it is difficult to see what bearing these agreements as to payment of taxes have on the questions in controversy.

They only bound the makers to pay what taxes were properly due, and there were none due.

VI. Claimant may Acquire Tax Title.

Whatever may be the rule in other States it is settled in Kansas that neither possession of or claim of title to a tract of land disqualifies the possessor or claimant from acquiring a tax title to it. This is indeed but the logical consequence of the impersonal system of taxation of land in that State.

Bowman v. *Cockrill*, *6 Kas.*, *331*, was an action of ejection in which defendants set up title through a tax deed to J. G. Brown. Valentine, J., said: "But there is a question raised by the plaintiff below

concerning the possession of the property by the holders of the tax deed, which we will consider before proceeding further.

"J. G. Brown, to whom the tax deed was made, was in actual possession of the lot in dispute at the time and before it was assessed or taxed or sold for taxes, and at the same time and before the tax deed was made. The plaintiffs therefore claim that Brown could not take or hold a good tax title to said lot. But there is no evidence that tends to show that Brown was under any obligation, legal or moral, to pay the taxes on said lots, or that he committed any fraud in taking the tax title to himself. The lot was not assessed or taxed to him nor in his name; *and if it had been, if no fraud is charged it would probably make but little difference in this State, where taxes on land are not so much debts against the individuals to whom they are assessed as they are debts against and liens on the land itself. We know of no good reason why Brown should not have been able to receive and hold as good a tax title as could be received and held by any other person.*" The Supreme Court of California says: "If the defendant was under no legal or moral obligation to pay the taxes there is no principle of law or equity which precludes him from purchasing at the sale, though in possession at the time the assesment was made or when the land was sold." *Moss* v. *Shaw, 25 Cal., 38-45, et seq.* "One in possession of a tract of land at the date of the assessment may purchase at the sale unless it appears that he was bound to pay the taxes, in which event he can acquire no title by his purchase." (*Blackwell on Tax Titles, 2nd ed., 400 et seq.*)"

In our case (if there were any moral obligations to the government, which we deny,) it was upon the

purchasers from the Land Company, and not upon the Land Company itself.

The interest the Land Company had in the land after the subsales, was personal, not real property, nor taxable as such; it was a debt secured by a lien, and not specifically taxable at all. It would form one of the items making up the total of credits belonging to the company, the excess of which over their indebtedness would be taxable as part of their general personal property.

The Kansas provision was as follows (*Tax Law, sec. 1, G. S., p. 1019*):

"Sec. 1. The terms "real property," "real estate," and "land," when used in this act, shall include not only the land itself, but all buildings, fixtures, improvements, moneys, minerals, quarries, mineral springs and wells, rights or privileges appertaining thereto. The term "personal property" shall include every tangible thing which is the subject of ownership, not forming part or parcel of real property; also all tax certificates, judgments, *notes, bonds, and mortgages, and all other evidences of debt* secured by lien on real estate."

It is thus obvious that the interest of the company in the lands resold to subpurchasers could in no way make them equitably debtors to the county for the tax for which the certificates were issued to their agent. With no show of reason can it be contended that because they had already one lien for a debt on the land they could not acquire from the county a second lien for another debt.

VII. Total Failure of Consideration.

Norton vs. *Rock Co.*, *13 Wis.*, *613*, was an action to recover back the amounts paid for tax sale certificates, the sales on which they were issued having been void.

Paine, J., said:

"Of the plaintiff's right to have the money back, there is no question. The statute expressly provides that the county treasurer shall refund the money, with interest, to the purchaser or his assigns, sec. 110, chap. 15, R. S. 1849, re-enacted in the laws of 1859, chap. 22, sec. 26. *We think the same result would follow without any statute, by an application of the general principle, that money paid for a consideration which fails may be recovered back.* The counsel for the respondent contended that it was analogous to a sale on execution, where the judgment debtor's title to the land sold failed. He said the purchaser in such case buys at his own risk, and if the judgment debtor had no title, still the purchase money could not be recovered back. But we think the two cases entirely different. In the execution sale the purchaser bargains for the interest of the judgment debtor in the land. He understands beforehand that he is to ascertain at his own risk what that interest is, and what is its value. If the sale conveys to him that interest, there is no ground upon which he could recover back his money, even though the interest should prove less than he expected, or nothing at all, because by the very terms of the contract he took that risk. But in the case of the tax sale *it is not the title in the land that fails, but it is the authority to make any sale at all. It would be analogous to an execution sale, where there was no judgment or execution. And we do not understand that in such a case the purchaser could not recover back his money. On the contrary, it would seem clear that he ought to, where there was a mutual mistake, as to the facts of there being a judgment and an execution. And the*

same is true of a tax sale, where there is no authority to make it, and it ought not to be said, even in the absence of any statute upon the subject, that in such cases the purchaser takes the risk of there being no authority to sell. It might be prudent for him to examine into that matter for his own safety, but we do not think he is bound to do so at the risk of losing his money. On the contrary, when the proper officers offer to sell land for taxes or on execution, he may assume that they have authority, and if they have not, may recover his money. The statute therefore which places the matter beyond doubt, so far as tax sales are concerned, has only embodied in express terms that which would have resulted without it, from an application of general principles to the subject."

"The counsel for the respondent further claimed that the complainant should show that the money was demanded of the treasurer before this action was commenced. This position was based upon the statute which makes it the duty of the treasurer to refund the money on demand. *Perhaps it would be correct if the entire right of the plaintiff depended on the statute, but we do not think it does. On the contrary, it grows out of the fact that the county has received the money of the plaintiff on a pretended sale which it had no authority to make.* The statute neither originated nor destroyed the right of action, but only furnished an additional remedy by making it the duty of the treasurer to pay without any action. What ever remedy the party might be entitled to under this provision, by mandamus or otherwise, we think it was cumulative and not exclusive.

"We think, also, that the county is the proper party to the suit. If the tax sale was valid, it is entitled to retain the money; if void, its treasurer must refund it. It is really the party in interest, and the proper party to the suit."

Chapman v. *Brooklyn*, *40 N. Y. 372*, is a similar case. The city assessed two lots for improvements, and the tax being delinquent, sold them to a pur-

chaser who received the usual tax sale certificate. The sale turned out to be absolutely void, the assessment having been made against parties who were not the owners of the lots; and the purchaser of the certificate brought suit to recover back his purchase money.

DANIELLS, J., said:

"Before the property assessed could be sold, the law required not only that the owner should have an opportunity to pay the assessment, but beyond that, that proceedings should have been taken against him for its collection. The right to sell depended upon the taking and consummation of these proceedings in the manner required by the statute. The omission to take them against the owner of the lots was jurisdictional in its nature, and it rendered the commissioner *powerless to affect them by the sale which he attempted to make of them.* No consideration therefore existed entitling the defendant to the money it received from the purchasers upon the sale of these lots.

"In ordinary cases, the circumstances established in this action would be sufficient toentitle the plaintiff to recover the money paid upon the sale, with interest, for the consideration of the sale has entirely failed. The defendant supposed its own proceedings had been regular, and that it was consequently entitled to sell the land in question for the payment of the assessments made upon it and under the same impression the lots were bid off by the purchaser. The defendant received the purchaser's money for the right to the title it was expected and believed would be ultimately conveyed if the lands were not afterwards redeemed from the sale. *In fact, the city had no power to sell or in any manner affect or incumber the land in favor of the purchaser.* It was unable to give to him for his money, the right on account of which the city received it. And if the defendant can succeed in retaining it, that must be done on account of some peculiar immunity enjoyed by them as a corporation.

"The rule ordinarily applicable to cases of this description is well stated by Parsons in his work upon contracts. It is as follows: 'Where the consideration appears to be valuable and sufficient but turns out to be wholly false, or a mere nullity, or where it may have been actually good, but before any part of the contract has been performed by either party, and before any benefit has been derived from it to the party paying or depositing money for such consideration, the consideration wholly fails, then a promise resting on this comsideration is no longer obligatory, and the party paying or depositing money upon it can recover it back.' (*Parson on Cont., 2d ed., 386.*)

"No sound reason exists for exonerating even municipal corporations from the controling effects of this wholesome principle: *for it is equally unjust and inequitable for them to retain money they have acquired without consideration, as it is for a private person to do so.*

"In the present case, the defendant's own certificates imply an obligation to convey the term sold in the lots, for they contain a statement that at the expiration of two years the purchaser would become entitled to a conveyance of the property. *Not a mere formal conveyance, but one which would secure to him the fruits of his purchase, in case no redemption should be previously made, and that obligation it is out of the power of the defendant to perform.*

"The money in controversy, both legally and equitably belongs to the plaintiff, and it would not be creditable to an enlightened administration of the laws to turn him out of the Court without it."

Phillips v. *Hudson, 31 N. J. L., 143*, is a similar case.

The doctrine of caveat emptor is applied to tax sales by analogy with sales under execution; but that in the latter case, where the sheriff has no power to sell, the purchaser can recover his money as on a failure of consideration, see also *Boggs* v. *Hargrave, 16 Cal., 560.* It is like the case of payment of money on a void

judgment afterwards reversed. *Raun* v. *Reynolds*, *18 Cal. 275.*

See also *Hays* v. *Hogan*, *5 Cal.*, *241.*

VIII. Recovery under the Statute.

The provision construed in *Norton* v. *Rock Co.*, above (revised statutes of Wisconsin, 1849, page 162, sec. 110, re-enacted in Wisconsin laws 1859, chap. 22, sec. 26), is almost identical with Sec. 120, of the Kansas laws, (ante p. 22,) and is as follows:

"If the county treasurer shall discover before the sale as aforesaid that on account of irregular assessments, or for any other error, any of said lands ought not to be sold, he shall not offer the same for sale. And if after any certificate shall have been granted upon the sale of the same as aforesaid, the clerk of the Board of Supervisors shall discover that for any error or irregularity the lands so sold ought not to be conveyed, he shall not convey the same, and the county treasurer shall, on demand, refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser, or his assigns, out of the county treasury, with interest at the rate of seven per cent. per annum"

It was objected below that recovery could not be had under this provision, not only for the reason that payment by plaintiff was, under the circumstances, a voluntary payment of the tax, and not a purchase of the tax lien, a point which has already been sufficiently discussed, but because there was no discovery of any error after the original payment of money to the county treasurer, and also, because the purchase of the tax certificate by plaintiff, who had knowledge of all the facts, estops him from denying that the land was taxable.

It is not, of course, disputed that there was really an error; that the State Supreme Court erred in holdin *K. P. R. W. Co.* v. *Culp.*, *9 Kan.*, *38*, that the title has passed from the United States and that the lands were taxable and the State authorities erred in acting in this opinion, and that this error was discovered when this Court reversed the State Court in *R. R. Co.* v. *Prescott*, *16 Wall.*, *603*, but it is said that every one is assumed to know the law, and therefore, in contemplation of law, the county authorities never discovered anything, and of course knew they were wrong all the time.

Such an argument does not seem to call for serious consideration, nor is there more force in the second point: defendants admit they made a contract to give a tax title, but they say, you knew at the time we could not do so, and therefore, we are not obliged to perform our agreement, and because you contracted with us to give you a tax title when you knew or ought to have known we had none, you have no right to get either title or money.

It is sometimes said that a grantee is estopped from setting up his own title against that of his grantor, in the absence of mistake or fraud, but the idea that the grantee is estopped from showing against his grantor that a third person had a better title at the time of the grant, because the grantee knew or ought to have known of it, calls for no discussion.

Lamborn was not culpable or negligent, because he understood the law as interpreted by the Supreme Court of Kansas; had that exposition been well founded, Lamborn would not merely have protected his company against tax titles in third persons, but would have obtained for them tax titles that would

have extinguished the titles of the subpurchasers, and given the company new sources of paramount title.

A more forcible argument is, that under the decision in *Curtis* vs. *Brown Co.*, *22 Wis.*, *167*. *Norton* v. *Rock Co.* is inapplicable to the present case, because the tax lien was purchased by a person claiming title to the land itself. But an examination of *Curtis* v. *Brown Co.* shows there is no such rule laid down. Plaintiff bought tax sale certificates and took tax deeds on lots belonging to himself, but on which the assessments, tax sale certificate and tax deeds were void for misdescription, and after the period had elapsed when a reassessment could be made, brought suit to recover the money paid for the tax sale certificate, so that had he succeeded, his property admitted to be taxable, would have escaped taxation altogether.

DIXON, C. J., said:

"But though the proceedings are void at law for the reasons above stated, it does not follow that the present plaintiff would under all circumstances be entitled to recover back from the county the money paid by him for the certificates. The action is in the nature of an action for money had and received, which lies only to recover back such sums as may be equitably due to the person bringing it. It appears from the stipulation that at the time the plaintiff purchased the certificates from the county, he was the owner of some of the lots of a corresponding description. If it had been so stipulated or otherwise shown that the thirty-three lots in 'Arndt's second addition,' of which the plaintiff is now the owner, paid no taxes for those years, and were not assessed, except by the defective description of 'Arndt's addition,' and that the assessments were just and equitable, and the same they would have been but for the mistake of description, or in other words if it

had appeared that the omission of the word 'second' was a mere clerical error, that plat being intended, then we think the plaintiff would not have been entitled to recover back from the county the money paid for tax certificates on those lots. Such facts would constitute a good, equitable defense to the action. Taxes are debts due to the government, and when charged on lands, constitute a fund out of which they are to be paid, so that whoever afterwards acquires title and possession of such fund, does so, so far subject to the burthen thus imposed, as that he cannot recover back money which he has once paid into the public treasury for the same taxes. This principle of equity which looks only to the justice of the transactions without regard to merely legal defects or errors not affecting their merits seems very clear. A mere mistake in the description does not affect the equitable right of the county to retain the money in its possession. It is the same as if no such mistake had intervened.

So that in the Wisconsin case the plaintiff if successful would have got back money he ought originally to have paid to the county, while in our case the county, if successful, will have succeeded in keeping money it never ought to have received. Coke says (*4 Rep., 99*) "*Qui sentit onus, sentire debet et commodum.*" But defendants think we ought to lose both title and money.

IX. Natural Justice of the Matter.

It was urged below that if plaintiff had judgment, the Land Company would have succeeded in escaping their portion of the public burthen—that they would have the benefit of the government without contributing to the support thereof, &c.—and this, because the Land Company, if the lands were not taxable, were themselves the equitable owners there-

of. In plain English, this Court is accused of giving its sanction in the Prescott case to some technical quibble on the part of the railroad company, by which, although possessing the substantial ownership of the land, they were enabled to evaded the payment of taxes upon it. This *ad captandum* line of argument is not justified by the facts, for the subpurchasers would in any view be the substantial owners of the land, the Land Company having but a lien for purchase money, and it is moreover wholly misplaced. This Court declared the lands not taxable because the railroad had acquired no interest in them whatever. They got no benefit from the State government in respect to them, for they were not theirs, and they did not escape their portion of the public burthens, for they did not own the property in respect of which such portion was claimed. The contracts of the railroad company with the Land Company, and those of the Land Company with the subpurchasers passed no title, for neither of them had any title they could convey. And if any of them had taken possession of parts of the public domain they were mere trespassers upon it. There is obviously no principle of natural justice that should prevent the land company recovering what it had paid for purchase of the certificates. On the contrary it will evidently be a case of great hardship if they lose at once the little they derive from their contracts with the railroad company, the tax titles they had contracted for, and which would have been available against their subpurchasers, and the money paid for the tax certificates also.

In *K. P. R. W. Co.* v. *Culp*, *9 Kan.*, *47*, BREWER, J., says: "Was the land taxable? If it was the property of the railroad company it was taxable; if it

was the property of the government it was not taxable." And he holds it to be the property of the company and subject to taxation. So on error (*16 Wall., 605*), the reporter thus states the question submitted: "The primary question thus was, who was the owner of the land at the time it was assessed and taxed, the United States or the railroad company? If the United States, then the land was not subject to State taxation, and the sale was void. If the railroad company, it was, and there being in that case no question about the regularity of the sale, the title of the company had been divested." And on this question the Kansas Court is overruled.

X. County has no Just Right to keep Money Never Due.

If there had been no mistake of the law about the matter, the county would not have taxed, or sold these lands for taxes, or ever received the money in dispute. It received it by a wrong, and a wrong of its own doing, and claims to keep the money, although it is now conceded that it had originally no right to get it at all. There are cases in which a municipality may keep money it has received for taxes, although the tax be absolutely void, and it had no right whatever to the money collected for it. But these cases are cases of voluntary payment, when the money is received without notice of there being anything wrong about the matter, and the municipality is thus in no way warned against disbursing it for the purposes for which it was raised. The present case is entirely different; it received the money on a contract with Lamborn. The officers knew that contract had to be performed or the money refunded.

And it was appropriated with full knowledge of the contingent liability for its repayment, which was incidental to them, as to all other tax sale certificates.

There is this real distinction between the present case and that of the *Dubuque & Sioux City R. R. Co.* v. *Webster Co.*, *40 Ia*, *16*, which was much relied on by defendant below, for that was a case of pure voluntary payment. MILLER, C. J., said: "The simple claim is that the plaintiff paid the taxes voluntarily, with full knowledge of all the facts upon which they based their claims of ownership of the lands, believing and insisting that they were the owners thereof in fee simple, but that it was afterwards decided by a competent Court that they had no title thereto." Our case, as appears from the eighth finding of facts (Abstract, p. 12), is entirely different. Lamborn and his company knew their title was at stake in the Prescott litigation, and, instead of paying the taxes, took the precaution (at much greater expense) to contract with the county for tax titles. And that contract the county ought to perform or refund. It cannot be a just answer to an action to make them, that the claimant had the misfortune to have taken a worthless title to the land taxed, and therefore the county could repudiate its contract and confiscate the money.

XI. No Question of Fact before this Court.

Defendants below did not except to the special findings, but on the argument of the conclusions of law to be drawn from them, urged that plaintiff had failed to prove that the lands were the lands granted to the railroad company by the United States, because, although it was conceded they were in the odd num-

bered sections within the limits of the railroad grant, the findings did not negative the possibility of their being mineral lands, or lands sold, reserved or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had attached at the time the line of the road was definitely fixed (*Sec 3 of first Pacific Railroad Act, 12 U. S. Stat., p. 492*).

The Court below did not entertain the contention, which was in fact an after thought, for no issue on this point had ever been raised in the case, and the last paragraph of defendant's answer (Abstract, p. 8) expressly alleged that the lands were granted to the railroad company by the United States.

It would have been absurd for the Court below to certify a division of opinion to this Court if the case had been decided against the plaintiff on a failure to prove a matter of fact. And a perusal of the whole pleadings and special findings makes it obvious that the latter are not more specific on this point only because it was assumed by both parties that these were "railroad lands," and the case one turning exclusively on questions arising from their non-taxable character.

Curtis v. *Smith*, *42 Ia., 665*, was an action of ejectment. Plaintiffs had a derivative title, admitted to be better than the derivative title claimed by defendant, by quit-claim from the same source, but the latter relied on a tax title he had obtained. BECK, J., said:

"But plaintiffs urge that Smith could not acquire a tax title, because of the quit claim deed and the fact that he was in possession of the land. As we

have seen the quit claim to Smith gave him no right—it was and is nothing. Having no right under it, he could not redeem because he held it. *As it conveyed no title to him, it imposed no obligation upon him to pay the taxes.* This is plain. No one has a duty resting upon him to pay taxes on land he does not own and has no interest in of any kind. The evidence fails to establish that he undertook or promised any one to pay the taxes. There was neither moral nor legal obligation resting upon him to pay them. *He was, under the quit claim deed, if in the possession of the land, a mere trespasser. Under these circumstances he was not forbidden by the law to acquire a tax title to the land.*"

That payment of a tax on land to prevent its sale, although the sale would be absolutely void and convey no title, is not a voluntary payment; see *Stephen* v. *Daniels*, 27 O. S., 527.

C. E. BRETHERTON,
Of Counsel for Plaintiff in Error.

No. 1019.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

C. B. LAMBORN,

Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DICKENSON,

Defendant in Error.

Reply to Brief of Defendant in Error.

CHAS. E. BRETHERTON,
Of Counsel for Plaintiff in Error.

Filed _____

_____ Clerk.

IN THE SUPREME COURT

OF THE

UNITED STATES.

C. B. LAMBORN, *Plaintiff in Error,* *vs.* THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DICKENSON, *Defendant in Error.*	No. 1019.

REPLY

TO BRIEF OF DEFENDANT IN ERROR

The careful presentation of the case submitted for the defendant in error seems to call for notice upon two or three points.

In substance, the theory of the case offered depends on the assumption that there was a payment of taxes, that the payment was voluntary.

and that plaintiff or his principals were under a moral obligation to make such payment. This will be at once seen on referring to the summary of the argument, with which defendant's brief concludes. (P. 16.)

No notice is taken of the fact that most, if not all, the lands taxed belonged not to the Land Company but to their subpurchasers, and that the Land Company was not, in substance, the owner of the lands at all, but merely a creditor for the purchase moneys remaining due for them.

It is said (p. 2), as a deduction from the eighth finding, "that it was no part of the purpose of the plaintiff to acquire tax titles to these lands." But it is not a legitimate one. The finding states the motives which actuated Lamborn in taking the tax titles and the use he intended to make of them, which is quite a different thing. The intentions or expectations, which actuated him in contracting with the county for tax titles cannot be the measure of the effect of that contract or the obligations it created.

Again "he hoped to provide against the results of his act flowing from a mistake of the law." This is not a fair statement of what Lamborn did. In taking tax titles he placed himself in a position in which he was not required to decide what the law was, for he was safe on either side: the County agreed to give him a title or refund the money. But were it otherwise, why should a man not provide

against the results of a mistake of the law if he can? He is not required to risk his money on one side or the other of a doubtful question, if he can find any way of escaping such a dilemma.

We do not claim to recover as for money paid on a mistake, either of law or fact, and therefore need not notice the arguments (p. 3 and 4) directed against such a position.

Proceeding to apply the technical maxim that every one is presumed to know the law, defendant's counsel strains its application to an extent that seems to shock one's common sense of justice. It is inferred, if not directly alleged, that not only must a man know the law, but he must act on his knowledge, and that there is something inequitable or morally wrong in his evading the necessity of being either right or wrong. The Courts, however, take notice that there may be doubtful points of law; and it has been held lawful to wager on their result. (*Jones vs. Randall, Cowper*, 37). In *Poole vs. Whitcomb*, 12 *C. B.*, 770, WILLES, J., said: "I do not agree that every man is to be presumed to know the law."

It is said (page 4) "the plaintiff knew then that the title to the lands was in the United States; that the lands were exempt from taxation; that the tax levy was without legal sanction and void; that a sale of the lands for such taxes would be ineffective and no title could be made in pursuance of the sale; that no rights or interest that had been acquired in the lands by the land

company could be in the least endangered by these tax proceedings; and that the tax certificates he took upon them conveyed no right or interest in then, and were void in their inception."

The rule that money paid under a mistake of law cannot be recovered back, is upheld for the sake of peace or finality in men's dealings; but it has never been supposed to make it criminal for persons not to be infallible in their ideas of what the law is, and there is something akin to the ridiculous in gravely saddling the present plaintiff with a clearness of vision on legal matters the Supreme Court of his own State turned out not to possess.

A person who pays money to another for a consideration, which, had he known the law, he must have been aware he did not get, is not precluded from recovering it back. The rules as to voluntary payments and payments under a mistake of law do not apply to such a case. Thus, an eminent jurist has held that a man who pays money on an agreement void for noncompliance with the Statute of Frauds may recover it back as on a total failure of consideration, even if the other party were willing to treat the contract as binding. (*Scott vs. Bush*, 29 *Mich.*, 523.)

Nor are counsel fortunate in their next illustration (p. 4). "But the case is different with the party who takes the promise of another and pays a consideration therefor, with a full knowledge of the fact that performance is inherently impossible.

In this case the party bargains for a nugatory promise, and gets it, and is the victim of his own folly. From the consequences of such conduct Courts were not instituted and do not exist to deliver mankind."

If one man pays another to do an act which is impossible, there is no consideration for the payment, and the person paying can recover back his money as on a total failure of consideration. It is only in the case of illegal or immoral contracts that one man can keep another's money without giving him any equivalent for it, for then the parties being *in pari delicto* and equally criminal, the law refuses assistance to either. So all the text writers.

Parsons, Vol. I, p. 461.
Chitty, 11th Am. Ed., pages 65, 920, 921.
Addison (Morgan's Ed.) s. s., 634, 643, etc.

Then it is said (p. 5) "The plaintiff might have retained his money and have totally disregarded these proceedings with perfect safety *and this he is conclusively presumed to have known.*"

There is no such sweeping presumption. A man is presumed to know the law so far, that he is not allowed to allege a mistake in it, to avoid the consequences of an act done, (as said in *Lyon vs. Richmond*, 2 *Johns. Ch.*, 51) "to overturn a settlement between parties," and no further. Nothing more was decided in *Jacobs vs Morange*, 47, *N. Y.* 57, and there is no analogy between that case and

the present one. Here we make a contract with the county, which obviates the necessity of acting on either one construction of the law or the other; we do not try to overturn any settlement with them, for none was ever made. All we ask is that they should stand to their contract, and their reply is that we had no right to "hedge" against the possibility of the Supreme Court of Kansas being right and the lands taxable, and therefore our contract is void.

Again it is said (p. 5.), if plaintiff "steps aside and *discharges the taxes* without being subjected to the slightest legal compulsion, he is in no situation to ask the Court to stretch out its arms and restore him his money." This is just assuming what is to be proved. Purchasing a tax certificate is not discharging the taxes, although in some cases it may have the same effect. That it had in this case, counsel ought to demonstrate, instead of that, they boldly take it for granted.

So, again on p. 15, it is quietly assumed that the Land Company had no right to purchase tax certificates, and did not do so. "The Land Company had its option either to pay the taxes, or to institute suit to set them aside and cancel the certificates and by either means remove the impediment. *It adopted the first alternative*, and if that was not the wisest course, the company alone was to blame." What was there illegal or immoral in the company adopting the third course, which council do not notice, and which the jurisprudence of Kansas left open to them? To purchase tax cer-

tificates which would practically discharge the taxes, if the lands were taxable, and yet not confiscate the company's money if no tax were due.

Counsel are obviously in error as to the condition of the Railroad Company's title to its grant. They say, "so far in fact has the equitable ownership passed by the grant and building of the railroad, that in case the Railroad Company were in default in performance of the remaining conditions so as to forfeit the right to the title, the money derived from the sale of the lands by the United States, belonged to the company, and the land grant act directed its payment to it."

If the company became entitled to the lands by complying with the conditions of the grant, and did not sell them within three years after the completion of the road, the lands became open to pre-emption at the minimum price of government lands, but until they paid for the survey they had no proprietary interest in the lands at all. This is clear from the rulings of this Court in the *Prescott* and *McShane* cases, (16 *Wall.*, 603; 22 *id.*, 444.) So again it is inaccurate to say the Railroad Company "had acquired an interest in the lands to the extent of being entitled to a patent upon payment of a trifling expense, or in lieu of that, the price at which the United States should sell them." This is just the interpretation of the position of the Railroad Company that the Supreme Court of Kansas accepted, and this Court refused to adopt. The Railroad Company, it held, had no vested interest in the lands at all.

Nor had the Land Company any solidarity of interest with the railroad company; they purchased from it, as settlers in turn purchased from them. If the failure to pay for the surveys by the former company was (as counsel rather insinuate) a reprehensible device to escape its share of public burdens, the Land Company was not responsible, and ought not therefore to be mulcted on technical grounds of money which, it is now settled, it did not owe.

No ingenuity can disguise the fact that the county wants to keep money to which this Court has decided that they had originally no valid claim.

CHAS. E. BRETHERTON,
Of Counsel for Plaintiff in Error.

Defendants Brief

IN THE SUPREME COURT

OF THE

UNITED STATES.

Error from the Circuit Court for the District of Kansas.

CHARLES B. LAMBORN, *Plaintiff in Error,*

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DICKINSON, *Defendant in Error.*

IN THE SUPREME COURT

OF THE

UNITED STATES.

Error from the Circuit Court for the District of Kansas.

CHARLES B. LAMBORN, *Plaintiff in Error,*

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DICKINSON, *Defendant in Error.*

The brief for plaintiff in error sets forth an abridgment of the pleadings in the court below, the special findings of fact made by the court, the judgment rendered thereon, and certificate of division of the Judges, and those sections of the Kansas tax law which have relation to the matters presented for consideration in this case.

The plaintiff in error, it will be observed, sustains to the National Land Company, named in the findings, in respect to the matters embraced in this controversy, the relation of trustee, the said company being the real party in interest. (See third finding.)

The National Land Company purchased from the Kansas Pacific Railroad Company upon the terms mentioned in contracts entered into between the two companies, between the 1st of September, 1868, and the 29th of June, 1870, the

lands in respect to which this controversy arises. (Sixth finding.)

And in these contracts agreed with the railroad company to regularly and seasonably pay all such taxes and assessments as might thereafter be lawfully imposed on said lands. (Seventh finding.)

The National Land Company, under these executory contracts with the railroad company, claimed the ownership of these lands, dealing in them, and entering into obligations with others to whom they sold portions of them, to make titles to them when payment should be made therefor, requiring purchasers from it to pay the taxes on the lands they purchased—which, however, they failed to do. (Seventh finding.)

The railroad company also agreed on its part with the National Land Company to convey to it any of the lands embraced in said contracts, upon request of the land company, and payment of the purchase money therefor. (Ninth finding.)

It is nowhere claimed that the plaintiff was ignorant of any of the facts in regard to the condition of the title to these lands, but he was in doubt as to the law upon which the legality of the taxes depended, and if it turned out that the law supported the taxes he desired to prevent the alienation of the land through tax titles, but, if the taxes were illegal, his purpose was to bring actions to recover back the money so paid. (Eighth finding.)

So that it was no part of the purpose of the plaintiff to acquire tax titles to any of these lands, but if the taxes were a legal charge against the lands, the payments made were intended by him to operate as a discharge of the tax lien by payment of the taxes, and if he afterward ascertained that the law did not sanction the tax levy, he hoped to provide

against the results of his act flowing from a mistake of the law.

In the petition in the court below the plaintiff states that at the time of the several payments, so as aforesaid made by it into the county treasury of said county, the plaintiff was not aware of the exemption of lands from taxation, but supposed, as was claimed by the officers of said county, that said taxes were legal and valid; that so soon as the plaintiff was aware of the fact of the illegality of said taxes, to wit, on or about the 1st day of January, 1874, he offered to return said tax certificates to the County Treasurer of said county, and at the same time demanded of such Treasurer that he refund to this plaintiff the several amounts so as aforesaid paid by him into the county treasury, with interest, etc., which was refused.

There is here no direct allegation of ignorance of any fact the knowledge of which was necessary for the plaintiff to understand the status of the tax levy. If it could be so construed, the allegation is traversed by the answer, and the findings afford no countenance to such a theory. Besides, the relation of the plaintiff's *cestui que* trust to the title precludes almost the possibility of such ignorance.

"Every man must be compelled to take notice of his own "title."

The lands claimed by the National Land Company, and upon which it paid these taxes, were within the Kansas Pacific Railroad grant. It knew (for it was a matter of public law) upon what conditions, and under what circumstances, the United States would convey the title to the railroad company. It knew whether or not a patent had been issued to the railroad company, conveying these lands. All patents for lands are recorded and public, and gross negligence alone could lead to ignorance of this fact.

Until the patent issued, the presumption obtained that the conditions upon which it should issue were yet unfulfilled, and after its issue it might well be presumed that all things necessary to be done to entitle the railroad company to the patent had been done. It is useless, however, to argue this point, since, although the special findings state minutely the condition of the title at the time of these tax payments, but fail to find that the plaintiff was in ignorance of a single element of fact necessary to a full understanding of his rights and the extent of his obligations in the premises, there can be no claim to a recovery made upon such a theory.

The plaintiff knew, then, that the title to the lands was in the United States; that the lands were exempt from taxation; that the tax levy was without legal sanction, and void; that a sale of the lands for such taxes would be ineffective, and no title could be made in pursuance of the sale; that no rights or interest that had been acquired in the lands by the land company could be in the least degree endangered by these tax proceedings; and that the tax certificates he took upon them conveyed no right or interest in them, and were void in their inception.

A. might take the promise of B. for the conveyance to himself of land, the title to which he knew to be in a stranger, and pay his money upon such a promise without losing his right to a recovery of his money in case of a failure in B. to make the title. In such case there would be no impossibility of performance, and A. might reasonably rely on B. to secure the title. But the case is different with the party who takes the promise of another, and pays a consideration therefor with a full knowledge of the fact that performance is inherently impossible.

In this case the party bargains for a nugatory promise, and gets it, and is the victim of his own folly. From the

consequences of such conduct, courts were not instituted, and do not exist, to deliver mankind.

The plaintiff might have retained his money, and have totally disregarded these tax proceedings with perfect safety, and this he is conclusively presumed to have known. But if he steps aside and discharges the taxes without being subjected to the slightest legal compulsion, he is in no situation to ask the court to stretch out its arm and reach him his money. There is here no failure of consideration, for there was nothing bargained for.

An examination of the authorities cited by plaintiff's counsel, on pages 34, 35 and 36 of his brief, will show that they contain nothing inconsistent with the views here maintained. In *Norton vs. Supervisors of Rock County*, 13 Wis., 613, the purchaser of the tax certificate was a stranger to the title to be cut off by the tax sale. He was not chargeable with a knowledge of the want of authority in the officers to sell. He bought under the belief, which he had a presumable right to entertain, that the sale was valid. In case of a sale on execution, wherein from the nature of the proceedings the purchaser is chargeable with notice of the extent and nature of the interest sold, if it turns out that nothing has passed by the sale, the money paid thereon is irrecoverable. And so, by analogy of a tax sale, if the purchaser thereat either sustains such a relation in respect to it that he must conclusively be presumed to have full cognizance of all the facts necessary to an understanding of the character of interests he acquires, he is equally without remedy if he gets nothing. Justice Paine remarks, in the case under review: "It would seem clear that he ought to [recover the money "paid at the execution sale], where there was a mutual mis- "take as to the facts of there being a judgment and an exe- "cution." To make the reasoning of the court serviceable

to the plaintiff here, it would be necessary to extend it to an assertion that the purchaser at an execution sale would be equally entitled to recover his money paid thereon in the entire absence of any mistake as to the existence of a judgment and an execution. A party may safely trust to appearances who is not chargeable with a knowledge of the facts, but if he either has knowledge of the falseness of the appearances, or is conclusively presumed to possess it, and notwithstanding acts upon the appearances, he acts understandingly, he is not taken by surprise. He knowingly takes that which has only the semblance of reality, and he suffers no injury and cannot complain.

In *Chapman vs. The City of Brooklyn* (40 N. Y., 372), the purchasers of the tax certificates had neither actual nor presumptive notice of the infirmity in the tax proceedings that rendered the certificate invalid. The authorities proceeded upon the belief that the proper parties, the owners, had been duly charged with the assessments, and that they were entitled to sell the land, and the purchaser bid off the same with that impression. It was expected and believed that if the lands should not be redeemed from the sale, the right to the title had by the sale passed to the purchaser, and that they would be ultimately conveyed in pursuance of the tax certificate. "The city had no power to sell, or in any "manner affect or incumber the land in favor of the pur-"chaser." But the absence of such power was not known to the purchaser at the time of the sale; neither was he chargeable with a knowledge of the fact. The jurisdiction or power to sell in that case depended in part upon acts and matters *in pais* of which the purchaser cannot be supposed to have had any knowledge.

In *Curtis vs. Brown*, 22 Wis., 167, cited in plaintiff's brief, on page 40, the lots covered by the tax certificates did not

belong to, nor were they claimed, by the purchaser of the certificates, as supposed by plaintiff's counsel. It was supposed that there was a misdescription of them, and that the lots owned by the tax-certificate holder were intended instead of those described. But the court ruled that the description in the tax certificates could not be aided by parol evidence, and it could not therefore be considered as embracing his property. The right to a recovery in that case was made to depend upon whether or not lots corresponding in numbers to these, and belonging to the tax-certificate holder, had escaped taxation for the corresponding year, and whether or not the tax paid would be but a just tax on such property. The main question in this case did not arise, nor was it considered in that. So far however from the court regarding it as a matter of indifference with respect to the right of recovery, whether the tax-certificate holders claimed to be the owners of the land or not, providing the tax was illegally assessed, it is clear that the court considered that the right to recover must depend, among other things, upon the absence of any such claim.

The Supreme Court of Kansas, in *Wabaunsee County vs. Walker*, 8 Kas., 436, has thus stated the rule relative to voluntary payments: "A correct statement of the rule gov-
"erning such cases as this would be as follows: Where a
"party pays an illegal demand, without an immediate and
"urgent necessity therefor, or unless to release his person or
"property from detention, or to prevent an immediate seizure
"of his person or property, such payment must be deemed
"to be voluntary, and he cannot recover it back; and the
"fact that the party, at the time of making the payment,
"filed a written protest, does not make the payment involun-
"tary."

The rule here stated was subsequently quoted with approval by the same court, (16th Kansas, 597.)

It is believed that this rule is in substantial harmony with the general current of authority on this subject. (*Boston & Sandwich Glass Co. vs. City of Boston*, 4 Metc., 181; *Joyner vs. Third School District*, 3 Cushing, 567; *Shaw vs. Becket*, 7 id., 442; *Elliot vs. Smartwort*, 10 Peters, 137.)

Counsel, on last page of brief, refers to *Stephan vs. Daniels*, 27 Ohio St., 527, as establishing the doctrine that payment of a tax on land, to prevent its sale, although the sale would be absolutely void, and convey no title, is not a voluntary payment. The statement is too broad and general, as an examination of the case will show. "The property [in this "case] was returned delinquent for taxes and an assessment, "and the real estate advertised to be sold January 1859, at "delinquent tax-sale to pay the same." The taxes were valid —the assessment illegal. On the 13th of January, 1859, the plaintiff, in order to release the land from custody, and prevent its being sold at such sale, and to save the penalties incident to such sale, paid the taxes and said illegal assessment then due, under protest. And the court proceeds to say, on page 532:

"Was this a voluntary payment? It was made after a tender of all the legal taxes due, and after the officers had resorted to the summary remedy by advertising a sale, with the tax penalties and interest incident, and the officer was about to sell to prevent a sale and avoid the statutory penalty required to redeem. It was about to be sold for the legal taxes as well as the illegal assessment."

A sale of the land under these circumstances would have thrown a cloud over the plaintiff's title. And notwithstanding the assessment was illegal, the sale would have subjected the owner to the necessity and cost of redemption of his land from the sale for the taxes which were legal. Moreover, the

court proceeds to say, that the courts of the State had theretofore, by a course of decisions relating to tax proceedings, so restricted the application of the principles of the common law and in equity as to practically deprive parties suffering the aggressions of illegal tax proceedings of all remedy. The legislature therefore found it necessary to give to such a right of action directly against the officers in fault, and thus make the officers personally liable in case they proceeded to lay or collect an illegal tax. The provisions of the act are quoted on page 532.

As illustrating and sustaining the position of the court in that case, the opinion quotes from *Mariposa Company vs. Bowman*, Deady, 228, the following: "Where a sheriff has sold "real estate under a satisfied order of sale, and was about to "make a deed, and payment was made to prevent it, it is said: "'While I do not admit the doctrine that *duress of real prop-* "*erty* is never a sufficient compulsion, yet a mere cloud on the "title, or threat to create one, has never been held to produce "compulsion. It is not a controlling necessity which compels "the owner to pay the illegal demand. To make it a case "of payment under compulsion, there must be an illegal de- "mand, coupled with a present power or authority in the "person making such demand to sell or dispose of the "property if payment is not made as demanded.'" (Page 540.)

In the case at bar, there was no power in the officer to sell. He might go through the vain forms of a sale and conveyance, but no act of his could in the slightest degree change or affect the title, not even in appearance.

"The statutory provision for refunding the money paid "for the purchase of a tax certificate, upon the discovery by "the officer of an error or irregularity which would vitiate "the title, creates no new rights. The statute neither orig-

"inated nor destroyed the right of action, but only furnished "an additional remedy, by making it the duty of the treas- "urer to pay without any action." (*Norton vs. The Supervisors of Rock Co.*, 13 Wis., p. 688.) The plaintiff's right of recovery depends not on the statute, but upon the general principles of law applicable to this class of cases. It is objected by plaintiff, in brief, pages 23, 24 and 35, that so far from this transaction between the plaintiff and the county treasurer, wherein the tax certificates were transferred to plaintiff, being a voluntary payment, it was indeed no payment at all, for the reasons—1st, Lamborn obviously did not intend to pay the taxes on the specified tracts and extinguish the tax liens upon them when he bought the certificates, nor did the treasurer then understand the payment to have that effect, or he would not have assigned the tax titles to Lamborn; and, 2d, there was no debt to be paid, and payment supposes the existence of a debt.

What the Treasurer's understanding or intention was with respect to preserving or extinguishing a tax lien by an assignment of the tax certificates, we are not concerned to inquire; it is quite immaterial. He was a public officer, and could only bind the county in matters strictly within the scope of his authority. What the intention of Lamborn was, we are explicitly told. It was to prevent tax titles accruing upon the lands if they were taxable, and to bring actions to recover back his money if they were not. The National Land Company had acquired an interest in these lands through contracts of purchase from the Kansas Pacific Railway Company.

It was under contract-obligations with the railroad company to pay all taxes on them, legally imposed; it was therefore under a legal and fiduciary disability to acquire tax titles to itself upon the lands.

It was no part of its purpose to do so. The certificates in the hands of the land company, as between itself and the Kansas Pacific Railway Company, were receipts for payment if the lands had in fact been taxable. It paid the taxes for the purpose of removing the supposed lien on the lands, and prevent the accruing of tax titles on them. It gauged its present rights and duties by the instructions it might receive in the future as to the state of the law. If the law was one way, its act in taking the certificates was intended as a payment of the taxes, but if it was the other way, it was not so intended. If every man was permitted to transact his affairs and business with reference to his future enlightenment as to the law bearing upon the subject-matter, it would introduce a state of anarchy into human affairs which would lead mankind rapidly back to barbarism.

To the second objection, that to constitute payment there must be existing debts to be paid, we answer that the word payment is nevertheless used by the courts to express the act by which a party pays a supposed claim or demand in the absence of any corresponding obligation to do so. There is no debt and no legal obligation resting upon the party upon whom the demand is made, but the act by which the unfounded demand is satisfied is called by analogy, payment. The objection touches nothing substantial — it is a mere verbal criticism. The fact that the State Supreme Court had decided the lands taxable furnishes neither justification nor excuse to the land company in payment of the taxes. It knew that that was not the court of last resort upon the question, and knew that the railroad company was still contesting the right to tax the lands in this court.

The law was open to the inspection of the land company, and the mistake of a subordinate tribunal upon the question

of law furnished no ground upon which it could be relieved from the results of its own ignorance or mistake of it.

In *Jacobs vs. Morange*, 47 N. Y., 57, on page 59, Justice PECKHAM states: "The whole basis for this relief is founded "upon the fact that an inferior court made an erroneous de- "cision upon a question of law; that the plaintiff was misled "thereby, and suffered this loss. This is the best position "the plaintiff can take.

"What a flood of litigation would such a rule open! If "this can be regarded as the surprise that requires or justifies "equitable relief, how broad is the principle, how extensive "its ramifications! Almost every case reversed by this court "would form a basis of such surprise, especially when courts "of last resort reverse or modify their own decisions."

And, again, on page 60 occurs the following quotation from the opinion of Chancellor KENT, in *Lyon vs. Richmond:* "A "subsequent decision of a higher court in a different case, "giving a different exposition of a point of law from the one "declared and known when a settlement between parties "takes place, cannot have a retrospective effect and overturn "such settlement. Every man is to be charged at his own "peril with a knowledge of the law."

It has also been held in Iowa, that money paid to a municipal corporation under a mistake as to the validity of the law under which the assessment was made, cannot be recovered in an action by the payer against the corporation.

(*Kraft vs. The City of Keokuk*, 14 Iowa, 86; *Espy vs. The Town of Fort Madison*, 14 id., 226.)

THE NATURAL JUSTICE OF THE QUESTION.

We cannot agree with the plaintiff's counsel, that natural justice and equity requires the refunding of this money paid on the taxes, or that plaintiff has any claim on that ground.

While it is true that the Government had not parted with the title to the lands, and all the conditions upon which title should go to the railroad company had not been fulfilled, and consequently, as was decided by this court in *Kansas Pacific Railway Company vs. Prescott*, 16 Wallace, 643, the company was not fully entitled to the patent, and the lands were not legally taxable. Yet it is not strictly true, that the National Land Company had no interest in them as an owner. The lands were granted to the railway company to aid in the construction of the railroad. The substantial consideration for the grant was the building of the railroad. This was done. As a condition to the issuance of the patent, the cost of surveying, selecting and conveying them was to be paid by the railroad company. These conditions, though of necessary performance, are of comparatively trifling significance. They are simply those necessary expenses incident to ascertaining which of the lands were within the grant, and conveying titles. So far, in fact, has the equitable ownership passed by the grant and building of the railroad, that in case the railroad company were so far in default in performance of the remaining conditions as to forfeit the right to the title, the money derived from the sale of the lands by the United States belonged to the company, and the land-grant act directed its payment to it.

The National Land Company was the assignee of the railroad company with respect to the lands in controversy. The latter had acquired an interest in the lands to the extent of being entitled to a patent upon payment of a trifling expense, or in lieu of that the price at which the United States should sell them. It is difficult to conceive why the railroad company delayed the payment of this trifling expense so long, unless for the purpose of reserving the lands from taxation. Both the railroad company and the National Land Company

treated these lands the same as though the title of the Government had been extinguished, and they were the real owners of them. They bought and sold them, covenanting to give an indefeasible title to them to their grantees. These lands formed the basis of a large, and, we may justly presume, a lucrative business, in which the National Land Company employed a large capital. They remained non-taxable so long as, by withholding the small amount necessary to perfect the right of the railroad company to the patent, the title continued in the United States. In the meantime, by the building of roads and bridges, the establishment and maintenance of public schools in the vicinity of the lands, the maintenance of local government and order in the communities in which they are situated, they were rendered both valuable and salable, and the employment of the large amount of capital invested in them made profitable. Courts, and all the paraphernalia of the law, were, at great public cost, kept up, and their existence was necessary to the protection of the rights and interests of the land company growing out of their contracts in respect to these lands. All these great and indispensable benefits were enjoyed by the land company, in common with the rest of the community in the midst of which their interests were placed. In paying these taxes, that company contributed no more than its proportionate share of the price at which these benefits were secured. It thinks, however, that it was, upon the ground of natural justice and equity, entitled to all these advantages and benefits free of cost to itself, and at the sole expense of others—a theory of natural justice the like of which does not often find its way into distinct language.

If it were otherwise, however, and considerations of equity could be legitimately pressed into the service in support of the plaintiff's claim, it would still be unavailing. A party

must not have put himself in the wrong, or rendered relief necessary by his own willful or inconsiderate act. Moreover, it must be borne in mind that these lands were purchased by the National Land Company to sell again. It employed its capital in land traffic. So long as these taxes remained an an apparent charge against the lands, they would constitute an impediment to the business of the land company by turning away purchasers from them. The land company had its option either to pay the taxes, or institute suit to set them aside and cancel the certificates, and by either means remove the impediment. It adopted the first alternative, and if that was not the wisest choice the company is alone to blame. The removal from the tax records of these apparent tax liens was of sufficient advantage and benefit to the National Land Company to induce it, in the exercise of its choice of the means to effect such removal, to pay the taxes. We think, therefore, there was not a failure of consideration. The primary object the party had in view, viz., to prevent the accruing of tax titles on the land, was by this payment accomplished.

The fact that the county put forward an unfounded demand, under the mistaken belief that the right to tax the lands existed, can in nowise assist the plaintiff's case. The ignorance of the county officers either of the facts or the law upon which the validity of their proceedings depended, cannot atone for the supposed ignorance of the plaintiff of the law bearing upon the subject-matter. There was no element of deception, nor of coercion, practiced by the officers of the county upon plaintiff. Everything was fair and open to inquiry, and the parties stood and treated with each other upon equal terms.

CONCLUSION.

1st. We think then that this act of the plaintiff's cannot be regarded as the purchase of a tax title for the reasons, first, that upon the facts known to the plaintiff, and the law, of which he cannot plead ignorance, there was no existing title to be purchased; second, it was avowedly not his purpose to purchase and acquire, but to prevent the accruing of tax titles on the land, which could only be done by payment of the taxes, or the decree of a court annulling them. And the plaintiff rendered it unnecessary to appeal to the court for relief, by making payment.

2d. This method of removing these supposed tax-liens must be presumed to have been more advantageous to the plaintiff than would have been a suit having that end in view.

3d. Although there was no strict legal liability resting upon the plaintiff for these taxes so paid, yet, in their payment, he was but bearing his due proportion of the pecuniary burden, at the expense of which public security, material prosperity and the general weal are secured, in the manifold blessings and benefits of which the plaintiff was a participant. And having acquired by contracts of purchase and contracts of sale large and valuable interests in these lands, which were taxed, that needed the protection of orderly government, and as each member of the community, according to the value and importance of the interests of each to be protected and maintained, is upon every consideration of equity and public policy under obligations to bear his share of the burden which the protection of those interests impose, there is nothing in contravention of natural justice in refusing to comply with the plaintiff's demand.

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Of counsel for Defendant.